Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of Ameritech Michigan	)	
Pursuant to Section 271 of the	)	CC Docket No. 97-137
Communications Act of 1934, as	)	
amended, to Provide In-Region,	)	
InterLATA Services in Michigan	)	
	)	
	)	

COMMENTS OF THE COMPETITION POLICY INSTITUTE

ON THE PETITIONS FOR RECONSIDERATION AND CLARIFICATION OF BELLSOUTH AND USWEST

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INTRODUCTION AND SUMMARY

The Competition Policy Institute (CPI)[1] offers these comments in response to the Federal Communications Commission's (FCC) Public Notice of September 25, 1997[2] requesting comments on two petitions for reconsideration and clarification concerning the decision to deny the application of Ameritech Michigan to provide in-region, interLATA services.

CPI responds to two issues raised in Petitions filed by BellSouth and USWest ("Petitioners") concerning the public interest test. In particular, CPI opposes the Petitioners' arguments that the FCC exceeded its authority in interpreting the "public interest" requirements of section 271 of the Communications Act of 1934, as amended. In fact, the FCC's discussion of its role under the public interest standard is correct as a matter of law and policy. For these reasons, CPI urges the FCC to deny the petitions to the extent that they request reconsideration of the public interest discussion.[3] CPI does not oppose a clarification of the public interest discussion as set forth in these comments.

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[1]The Competition Policy Institute (CPI) is an independent, non-profit organization that promotes state and federal policies to bring competition to telecommunications and energy markets in ways that benefit consumers.

[2]Report No. 2228

[3]In the Ameritech Michigan Order, the FCC identified certain issues and made certain inquiries concerning the scope of its public interest review "for the benefit of future applicants and commenting parties and state and federal government officials." The FCC specifically stated that it was not setting forth an "exhaustive" analysis of the scope of this review. For these reasons, CPI questions whether a petition for reconsideration of the Ameritech Michigan Order is even appropriate given that the FCC did not reach any final decision concerning its public interest authority.

I. Summary of the BellSouth and USWest Criticisms of the FCC's Public Interest Discussion.

In their petitions, BellSouth and USWest attempt to limit the FCC's public interest review of applications submitted under section 271 by mischaracterizing the FCC's discussion in the Ameritech Michigan Order[4] and by misstating the law concerning the scope of the FCC's public interest authority. In fact, the Ameritech Michigan Order properly construes the FCC's public interest authority.

A. Extending the Terms of the Competitive Checklist.

Both BellSouth and USWest assert that the FCC's discussion of its public interest responsibilities in the Ameritech Michigan Order violates the Communications Act of 1934 ("Act"). In particular, they maintain that the FCC has proposed to extend the terms of the competitive checklist in violation of section 271(d)(4) of the Act, as amended by the Telecommunications Act of 1996 ("the 1996 Act"). They allege that this provision means that the FCC cannot examine the competitiveness of the local telephone market at all when considering a section 271 application. BellSouth argues that "[t]he Commission may not use the public interest inquiry to add local competition criteria beyond those that Congress included in the checklist." (BellSouth Petition, p. 12) USWest alleges that "the one category of issues that the [FCC] clearly cannot consider in exercising its responsibility to assess whether a grant of section 271

[4] Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, FCC 97-298, CC Docket No. 97-137 (rel. Aug. 19, 1997)("Ameritech Michigan Order")

application is in the public interest is local competition." (USWest Petition, p. 17) BellSouth attempts to support its position by citing a series of floor statements from Members of Congress during consideration of the 1996 Act.

B. The "pick-and-choose" rule.

BellSouth and USWest further accuse the FCC of "evad[ing]" the Eighth Circuit Court's interpretation of the "pick-and-choose" rule. (BellSouth Petition, p. 10; USWest Petition, p. 18) In the Ameritech Michigan Order, the FCC stated that it would "be interested in evidence that a BOC is making available . . . any individual interconnection arrangement, service, or network element" to other carriers on the same rates, terms and conditions. (emphasis added) USWest alleges that, by inserting the term "individual" in this requirement, "the Order reintroduces precisely the claim of right to select among individual provisions of agreements that the Eighth Circuit invalidated." (USWest Petition, p. 18).[5] Similarly, BellSouth argues that the public interest test cannot be stretched so far as to include a rule (the "pick-and-choose" rule) that the Eighth Circuit Court has found "conflicts with the Act's design".

[5]In addition, the USWest Petition includes an indirect attack on the FCC's consideration of TELRIC pricing as a part of its public interest analysis. The USWest Petition notes that the FCC asserted that compliance with TELRIC pricing would be considered as a part of its public interest review. USWest then stated "Nor does the public interest provision of section 271 give the Commission power to consider, in deciding whether to grant a section 271 application, a BOC's compliance with standards or factors with which the Commission cannot lawfully require the BOC to comply." (USWest Petition, p. 18-19) CPI supports the FCC's consideration of the TELRIC pricing standard in its review of 271 applications and believes that the FCC has the legal authority to examine prices as a part of its public interest review. Because this issue is currently pending before the Eighth Circuit Court of Appeals, however, and the Petitions do not explicitly ask for reconsideration of this issue in their petitions, CPI does not address this issue further in these Comments.

II. The FCC Properly Interpreted its Responsibilities to Enforce the Public Interest Standard in Section 271.

A. Congress reaffirmed its support of the historic public interest standard in the 1996 Act.

The public interest test is a long and historic standard that Congress has often chosen to govern regulatory policy even before the existence of the FCC. Congress has used this standard to delegate to the expert agency the power to exercise its judgment on how best to regulate the affected industry. Congress included the public interest standard in the Communications Act in 1934 because it recognized that the engineering, economics and law surrounding communications policy issues will be understood and applied better by an agency which specializes in these issues.

In enacting the 1996 Act, Congress reaffirmed its historic reliance upon the expertise of the FCC by restating the public interest standard in several new provisions of law. New Section 336(d) of the Act, as added by the 1996 Act, affirms that broadcast licensees remain subject to the public interest standard with regard to any ancillary or supplementary services they provide along with their provision of advanced television. New section 652(d)(6) allows the FCC to waive the cable-telephone cross-ownership restriction if, among other requirements, the transaction meets a public interest standard. New section 10 allows the FCC to forbear from applying any regulation or provision of the Act if it is consistent with the public interest. Clearly, the 1996 Act reaffirms Congress' historic trust in the FCC to exercise its judgment in deciding important communications issues.

B. The 1996 Act forbids the FCC from adding to the required checklist preconditions, but otherwise places no limit on the FCC's public interest authority.

The BOCs are correct that Congress limited the FCC's broad discretion to enforce the public interest test in one respect. Congress chose to forbid the FCC from limiting or expanding the competitive checklist in section 271(d)(4). Examining the language of section 271(d)(4), however, shows that USWest and BellSouth exaggerate the meaning and scope of this provision.

Section 271(d)(4) states

> The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).

The "competitive checklist" contained in section 271(c)(2)(B) is a list of actions that the BOC must take to open its network to competition. Section 271 requires the BOC to "fully implement" "each" of the requirements in the checklist. In other words, each item in this checklist must be satisfied as a "precondition" to approval of an application submitted under section 271. Under section 271(d)(4), the FCC can neither reduce the list to 13 items nor add a 15th item to that list of preconditions. Thus, section 271(d)(4) simply means that the FCC cannot impose additional requirements on the BOC that the BOC must satisfy as a "precondition" to approval of its application.

CPI agrees with the Petitioners that the phrase "by rule or otherwise" in section 271(d)(4) means that the FCC cannot use the public interest test to require the BOC to implement any particular provision in addition to those already contained in the

checklist. The FCC cannot add to the checklist either in enforcing section 271(c)(2)(B) or in enforcing the public interest test.

This, however, is the only limitation contained in the Act on the FCC's public interest authority. An amendment to limit further the scope of the public interest test was defeated on the floor of the Senate by a vote of 31-68.

Nevertheless, Petitioners maintain that the FCC's authority to implement the public interest test should be limited to examining the long distance market, not the local market. In addition to the fact that there is no statutory basis for this proposed "limitation", the floor statements relied upon by BellSouth do not support the proposition that the FCC's analysis should be limited to the long distance market. For instance, the statement of Senator Lott (the public interest test allows the Commission to "make sure that we have a fair and level playing field") applies equally to the local market as well as the long distance market.

As a result, section 271(d)(4) does not forbid the FCC from reviewing other BOC actions or inactions to open its network to competition under the public interest test. This provision simply forbids the FCC from requiring adherence to any particular market-opening measure as a precondition to interLATA entry.[6]

C. The FCC's broad public interest authority permits it to examine the competitiveness of the local telephone market.

Not only is there nothing in the legislative history to limit the FCC's authority to

[6] For example, the FCC is free to consider whether the BOC has implemented sub-loop unbundling as part of its public interest analysis, as long as it does not require this element to be implemented as a necessary precondition to 271 approval.

examine the local telephone market, the legislative history supports the FCC's authority to examine local competition as a factor in its public interest analysis. For instance, the purpose adopted by Congress in the preamble of the Conference Report (quoted above) can be read to indicate that Congress was principally concerned with the local market, not the long distance market. The preamble emphasizes Congress' desire to open **all** markets to competition. First, this purpose is not restricted to the long distance market. Second, it can be argued that the focus of this statement is on the local market, as the long distance market was already open to competition when the 1996 Act was passed.

D. The Courts have recognized the FCC's broad authority to implement the public interest standard.

Because Congress chose not to constrain the FCC's public interest authority (with the one exception noted above), the only boundaries that restrict the FCC's public interest inquiry are those set by the courts. The relevant court decisions demonstrate that the FCC's public interest authority is broad. In FCC v. RCA Communications, Inc., perhaps the seminal case interpreting the FCC's public interest authority, the Supreme Court stated that the public interest standard "no doubt leaves wide discretion and calls for imaginative interpretation." The Court added

> Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the vaguish, penumbral bounds expressed by the standard of 'public interest.'[7]

In FCC v. National Citizens Committee for Broadcasting, the Supreme Court

[7] 346 U.S. 86, 90 (1953).

added that the "public interest standard" necessarily allows the expert agency to exercise its discretion.

> [Where agency decisions are] of a judgmental or predictive nature, complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency,'"[8]

Even the case cited by BellSouth supports a broad interpretation of the public interest standard. BellSouth quotes from Business Roundtable, v. SEC, to say "broad 'public interest' mandates must be limited to 'the purposes Congress had in mind when it enacted [the] legislation'". 905 F. 2d 406, 413 (D.C.Cir. 1990) The purposes Congress had in mind in enacting the 1996 are quite broad. The Conference Report stated that the purpose of the legislation is

> to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.

This broad statement of Congress' purposes evinces no intention to limit the FCC's public interest authority.

E. The FCC does not require a BOC to comply with the pick and choose rule as a precondition of interLATA relief.

Similarly, the FCC did not require the BOCs to comply with the so-called "pick-and-choose" rule as a condition of receiving interLATA approval. At most, the FCC indicated that it would be "interested in evidence" that a BOC is making individual

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[8]FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 814 (1978).

items available. This articulation of the FCC's approach is consistent with the notion that the public interest test allows the FCC to consider a variety of issues related to local competition. As long as the FCC does not impose a requirement that a BOC must make every individual item available to competitors, it does not violate the Eighth Circuit Court's decision on this issue.

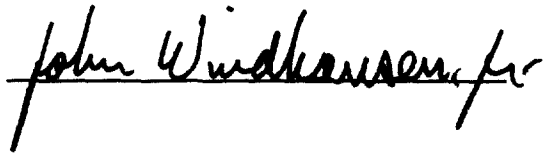
F. Conclusion

Except in one case, nothing in the legislation, the legislative history, or judicial precedent limits the FCC's historically broad authority to implement the public interest standard. The single exception is that FCC may not require a BOC to take any specific market-opening action as a precondition to receiving interLATA approval. The FCC may consider factors affecting the competitiveness of the local and the long distance market, as well as other factors, in its public interest review. The FCC may even give some factors greater weight than others, and it may consider whether the BOC has taken additional market-opening actions, as long as it does not elevate any of these factors into a necessary precondition.

The FCC properly indicated that it would closely examine the status of the local competition market in enforcing the public interest standard. The legislative history supports the notion that Congress expected the FCC to give heightened scrutiny to the openness of the local exchange market. As long as the FCC does not mandate that any one item must be implemented before it will grant a BOC application, the FCC does not violate the provision of section 271(d)(4) or the decision of the Eighth Circuit

Court of Appeals.

Under the relevant judicial precedent, the FCC is authorized to make a qualitative judgment of whether any application under section 271 serves the public interest. The FCC's discussion of the public interest test in the Ameritech Michigan Order is fully consistent with the legislation and with the relevant case law. For this reason, CPI opposes the Petitions to the extent that they ask for reconsideration of this aspect of the Ameritech Michigan Order. CPI does not oppose a clarification of the Ameritech Michigan Order as set forth above.



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